SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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CALVIN AUSBIN HUNTER,

Plaintiff,

- v -

BARNES & NOBLE, INC INDIVIDUALLY AND D/B/A BARNES & NOBLE BOOKSELLERS, INC.,MICHELLE SMITH, ACHILLES JAMES DAUNT, AMY FITZGERALD

Defendant.

INDEX NO. 153467/2022

MOTION DATE 11/09/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 27, 28, 29

were read on this motion to/for DISMISS.

In this action for employment discrimination, Defendants move for an order pursuant to CPLR 3211(a)(7) dismissing Plaintiff's First Amended Complaint in its entirety. Plaintiff opposes the motion.

Plaintiff Calvin Ausbin Hunter ("Plaintiff") commenced this action on April 22, 2022 and subsequently filed an Amended Complaint on August 12, 2022 in which he alleges that defendants Barnes & Noble Inc. individually and d/b/a Barnes & Noble Booksellers, Inc. ("B&N"), Michelle Smith ("Smith"), Achilles James Daunt ("Daunt"), and Amy Fitzgerald ("Fitzgerald") (collectively, "Defendants") engaged in unlawful employment discrimination in violation of the New York State Human Rights Law ("NYSHRL") and New York City Human Rights Law ("NYCHRL"). Plaintiff asserts nine causes of action: race discrimination under the NYSHRL and NYCHRL, retaliation under the NYSHRL and NYCHRL, aiding and abetting under the NYSHRL and NYCHRL, race harassment under the NYSHRL only, supervisor liability under the NYCHRL only, and hostile work environment under the NYSHRL only.

Plaintiff, a Black male, has been employed by B&N since 1999. Fitzgerald is the Vice President of Stores for B&N. Smith serves as B&N's Vice President of Human Resources. Daunt is the Chief Executive Officer of B&N. Plaintiff alleges that Fitzgerald, Smith, and Daunt exercise supervision over his job, specifically that they have the power to control his job duties and to hire, fire, and discipline him.

According to Plaintiff, B&N first hired him as a bookseller in October 1999 and was soon promoted to Community Relations Manager. Plaintiff maintains that he received positive reviews for his work performance and received a promotion to Community Business Development Manager ("CBDM") in or around October 2011. However, Plaintiff characterizes this role as a "lower-management position" from which he has not been promoted further despite his high-quality work that purportedly generated significant income for B&N. He also avers that non-Black employees received promotions despite being less productive than him (Amended Complaint ¶ 57).

On or about June 11, 2020, Plaintiff emailed Daunt to lodge a complaint about discrimination at B&N, specifically his "complaints around social injustice and his firsthand account of neglect and unconscious bias towards minorities, especially African-Americans" (*id.* ¶ 68-69). However, Defendants apparently took no action to remedy the issues Plaintiff outlined in his email. Plaintiff alleges that he experienced retaliation for this email by being demoted, having his entitlement to commission eliminated, and experiencing "attempts at professional sabotage" that included "fabricated reasons for workplace investigations" and the sharing of "defamatory memoranda" about his professional capabilities (*id.* ¶ 71).

In around October 2020, the Defendants informed Plaintiff that his CBDM position was being eliminated and offered him a "lateral move" to the position of Business Development

Manager (*id.* ¶ 72). Plaintiff alleges that he was passed over at this time when a vacancy for a higher position, Regional Director, was filled by a white male instead. He contends that Defendants never offered him an opportunity to interview for the Regional Director position because of his race and because of his prior complaints about discrimination and because Defendants "had a glass ceiling in place preventing [Black] employees from reaching upper-level management within the company" (*id.* ¶ 78-79). Plaintiff was then allegedly tasked with teaching the new Regional Director how to perform the job.

Plaintiff alleges that he lodged another complaint directly with Daunt about his October 2020 non-promotion and the pattern of behavior around this action and that Defendants again took no corrective action. Instead, Defendants purportedly demoted him to the "store-level position" of Lead Bookseller and assigned him to the café department, actions he interpreted as retaliation for his complaint (*id.* ¶ 84). Although Plaintiff was able to continue his bookseller activities, Defendants allegedly stripped him of his ability to earn commissions for his sales (*id.* ¶ 85). Plaintiff contends commissions accounted for the bulk of his income.

Plaintiff claims that, in or around April 2021, a memorandum containing allegedly false accusations about Plaintiff was supposedly circulated within B&N. Plaintiff avers that Defendant Fitzgerald, B&N's Vice President of Stores, used the false allegations in the memo as a pretext to launch an investigation against him with the purpose of harassing him and setting him up for adverse actions up to and including termination (*id.* ¶ 89-92). In addition to launching this investigation, Fitzgerald allegedly was a "primary player" in the denial of Plaintiff's commission earnings (*id.* ¶ 93) and retaliated against him by refusing a request by Plaintiff's store manager to raise his salary by 15% and instead only approved a 3% raise (*id.* ¶

94-95). Fitzgerald has purportedly never refused similar store manager-approved salary requests made on behalf of similarly situated white employees (*id.* ¶ 96).

After this action was commenced, Plaintiff alleges that he was subject to further retaliation and discrimination from Defendants towards the end of July 2022 when he was reassigned to another lateral position, this time as a Marketing & Business Partnership Manager. This reassignment was detrimental to Plaintiff's business development as it disrupted his ability to develop his business activities outside of the office due to the requirement that all his work be done at the office (*id.* ¶¶ 100, 106). Plaintiff maintains that much of his business development work took place outside of the office at all hours of the day (*id.*). White B&N employees were allegedly not subjected to similar restrictions (*id.* ¶¶ 102-105).

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, "factual allegations which fail to state a viable cause of action" or "that consist of bare legal conclusions . . . are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

NYSHRL Causes of Action

The branch of Defendants' motion to dismiss Plaintiff's first cause of action alleging race discrimination under the NYSHRL is denied. A plaintiff states a claim for discrimination under the NYSHRL by pleading facts sufficient to support a prima facie case that the plaintiff (1) is a member of a protected class, (2) was qualified to hold the position, (3) suffered an adverse

employment action, and (4) the employer's adverse action or differential treatment occurred in circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

It is undisputed that the Amended Complaint sufficiently alleges that Plaintiff is a member of a protected class as a Black male, and that he was qualified for his position (*see* Amended Complaint ¶¶ 31-37). The Court further finds that Plaintiff has alleged sufficient facts to support his claim that he suffered from an adverse employment action in a context giving rise to an inference of discrimination.

Under the NYSHRL, "[a]n adverse employment action requires a materially adverse change in the terms and conditions of employment" and "must be more disruptive than a mere inconvenience or an alteration of job responsibilities" (*Forrest*, 3 NY3d at 306, quoting *Galabya v New York City Bd. of Educ.*, 202 F3d 636, 640 [2d Cir 2000] [internal quotation marks omitted]). Denial of a promotion can constitute an adverse employment action (*Santiago-Mendez v City of New York*, 136 AD3d 428, 429 [1st Dept 2016]), as can "reduction or pay or privileges" (*see Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 572 [1st Dept 2012]).

Here, Plaintiff has adequately pled that he suffered an adverse employment action. In addition to alleging that he was passed over for a promotion to Regional Director (Amended Complaint ¶¶ 74-77), Plaintiff asserts that he was demoted, reassigned to the "Café Department," and deprived of his ability to earn commission "which accounted for the bulk of his income" (Amended Complaint ¶¶ 84-85). Read together, these allegations sufficiently allege that he suffered a materially adverse change in the terms and conditions of his employment in the form of, *inter alia*, a reduction in his pay or privileges and denial of a promotion (*see Meija*, 95 AD3d at 572).

Under the NYSHRL, an inference of discrimination may be found where a plaintiff alleges that they were treated less favorably than similarly situated individuals not in their protected class, including where "[a] position was filled or held open for a person not in the same protected class" (*Sogg v American Airlines*, 193 AD2d 153, 156 [1st Dept 1993]; *see also Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 114 fn 2 [1st Dept 2012]). A plaintiff must plead concrete factual allegations that amount to more than "mere legal conclusions" to support an inference of discrimination in the context of an adverse employment action (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]).

Here, the Court finds that the Amended Complaint contains factual allegations sufficient to allege an inference of discrimination. With respect to his non-promotion, Plaintiff alleges that a white employee with fewer qualifications was made Regional Director (Amended Complaint ¶¶ 77-80). He further alleges that Defendants did not impose the workplace restrictions that he was subjected to on similarly situated white employees (Amended Complaint ¶¶ 102, 104).

The Court denies the branch of Defendants' motion seeking dismissal of Plaintiff's second cause of action alleging race-based harassment in violation of Section 296(1)(h) of the NYSHRL. The NYSHRL provides, in relevant part, that it is unlawful for "an employer . . . to subject any individual to harassment because" of the individual's race or color "when [the harassment] subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in" these protected categories (N.Y. Exec. L. 296[1][h]). Here, the Court finds that Plaintiff states a cause of action for race-based harassment under the NYSHRL by alleging that he was subjected to "inferior terms, conditions, and privileges of employment" and specifically that he was subjected to a pretextual investigation that relied on defamatory false documents and that he was made ineligible to receive sales commissions

(Amended Complaint ¶ 131; *cf. Forrest*, 3 NY3d 295 at 306-307). Furthermore, the Complaint sufficiently pleads racial animus as the basis for this cause of action by alleging that white employees were not subject to the same alleged mistreatment as Plaintiff.

The branch of the motion seeking dismissal of Plaintiff's third cause of action alleging retaliation under the NYSHRL is denied, as the Court finds that Plaintiff states a cause of action for retaliation. A plaintiff states a cause of action for retaliation under the NYSHRL by alleging the prima facie requirements that (1) the plaintiff engaged in a protected activity, (2) the employer was aware of the protected activity, (3) the plaintiff suffered an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action (*Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018]; *Forrest*, 3 NY3d at 312-313). Protected activity includes lodging complaints with an employer about disparate treatment or opposing unlawful discrimination (*Forrest*, 3 NY3d at 313). A causal connection between a plaintiff's protected activity and an employer's disadvantageous action can by shown by the temporal proximity these actions or other facts (*Harrington*, 157 AD3d at 586; *see also Noho Star Inc. v New York State Div. of Human Rights*, 72 AD3d 448, 449 [1st Dept 2010]).

Here, Plaintiff alleges that he engaged in protected activity by emailing Daunt with his complaints about purported racial discrimination against him in 2020 (Amended Complaint ¶ 69). Plaintiff also asserts that he experienced an adverse employment actions in the form of demotion, elimination of his entitlement to commission, and "professional sabotage" in the form of a pretextual workplace investigation (Amended Complaint ¶ 71). All these actions occurred after Plaintiff's email to Daunt. Furthermore, it is beyond dispute that Plaintiff engaged in protected activity by commencing this action in April 2022. He contends that he faced restrictive changes to his job requirements "to the detriment of his income and income-generating abilities"

after bringing this action (Amended Complaint ¶ 103). Plaintiff has therefore sufficiently alleged facts in support of the elements required to sustain a retaliation cause of action under the NYSHRL (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]).

Defendants next move to dismiss Plaintiff's fourth cause of action for aiding and abetting under NYSHRL against individual defendants Fitzgerald, Smith, and Daunt. These branches of the motion are denied. The NYSHRL provides for vicarious liability for an employee who did not directly participate in unlawful discrimination where they "aid, abet, incite, compel or coerce" the commission of any acts forbidden by the respective statutes (N.Y. Exec. Law 296[6]). A plaintiff states a cause of action for aiding and abetting under the NYSHRL and NYCHRL by sufficiently stating an underlying claim for discrimination under the statute (*see La Porta v Alacra, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]) and by sufficiently alleging that the individual was aware of and condoned discriminatory conduct (*see Ajoku v New York State Off. of Temporary & Disability Assistance*, 198 AD3d 437, 438 [1st Dept 2021]). Here, the Court has found that Plaintiff has stated causes of action for discrimination and retaliation under the NYSHRL. Plaintiff further alleges that he communicated with the individual defendants about the alleged discrimination he experienced, that no corrective action was taken, and that further discriminatory conduct ensued. The Court therefore finds that Plaintiff has stated a cause of action for aiding and abetting under the NYSHRL.

The Court finds that Plaintiff fails to state a cause of action for hostile work environment under the NYSHRL and accordingly dismisses his ninth cause of action. Under the NYSHRL, a "racially hostile work environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'" (*Forrest*, 3

NY3d at 310-311, quoting *Harris v Forklift Sys., Inc.*, 510 U.S. 17, 21 [1993]). The alleged conduct must alter "the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff" such that a reasonable person to find that the environment was "objectively hostile or abusive" (*id*. at 311; *see also Thomas v Mintz*, 182 AD3d 490, 491).

Here, Plaintiff fails to allege any behavior on the part of Defendants that would amount to the pervasive race-based intimidation, ridicule, or insults necessary to create a hostile work environment under Section 296(1)(h) of the NYSHRL. The conclusory allegation in the complaint that Defendants created "an intimidating, hostile and offensive work environment" for Plaintiff specifically, and for Black employees generally (Amended Complaint ¶ 110) is insufficient to support a cause of action for hostile work environment under the NYSHRL (*see Askin*, 110 AD3d at 622). The allegations of non-promotion, pretextual investigation, and reduction in pay and material responsibilities that support Plaintiff's discrimination and retaliation causes of action do not constitute the severe or pervasive "discriminatory intimidation, ridicule, and insult" required to state a hostile work environment cause of action (*Forrest*, 3 NY3d at 310-311 [internal quotation marks and citations omitted]).

NYCHRL Causes of Action

The Court denies the branch of Defendants' motion seeking dismissal of Plaintiff's fifth cause of action for race discrimination under the NYCHRL. "To state a claim for discrimination under the NYCHRL, a plaintiff must only show differential treatment of any degree based on a discriminatory motive" (*Gorokhovsky v New York City Hous. Auth.*, 552 Fed Appx 100, 102 [2d Cir 2014]; *see also Harrington*, 157 AD3d at 584). Having met the higher burden of pleading the requisite elements of discrimination under the NYSHRL, Plaintiff has sufficiently pled that he was subject to differential treatment based on a discriminatory motive under the NYCHRL

(*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]; *Harrington*, 157 AD3d at 584).

The branch of Defendants' motion seeking dismissal of Plaintiff's sixth cause of action for retaliation under the NYCHRL is denied. Having sufficiently pled facts in support of his retaliation cause of action under the NYSHRL, Plaintiff has also pled facts sufficient to alleged that he suffered an employment action that disadvantaged him, and which would tend to deter him from engaging in protected activity under the NYCHRL (*Williams*, 61 AD3d at 66; *Harrington*, 157 AD3d at 584).

The Court denies the branch of Defendants' motion seeking dismissal of Plaintiff's seventh cause of action for aiding and abetting in violation of the NYCHRL. Plaintiff states an underlying cause of action for discrimination under the NYCHRL and sufficiently alleges that Fitzgerald, Daunt, and Smith were aware of and condoned the discriminatory conduct in their respective capacities (*see Ajoku*, 198 AD3d at 438).

Defendants argue that Plaintiff's eighth cause of action for "supervisor liability" against Fitzgerald, Daunt, and Smith under the NYCHRL should be dismissed because Section 8-107(13) of the NYCHRL is not an independent cause of action, as it merely codifies an employer's liability based on a violation of another subdivision of the NYCHRL. They further maintain that, under the rule in *Doe v Bloomberg L.P.*, 36 NY3d 450 (2021), neither Daunt nor Smith qualify as "employers" for the purposes of the NYSHRL and NYCHRL and that the entire complaint must be dismissed as against them.

NYCHRL § 8-107[13][b] provides for an employer's vicarious liability for unlawful discriminatory conduct of an employee or agent where the employee or agent "exercised managerial or supervisory authority" over the plaintiff; the employer knew of such conduct and

either acquiesced in or failed to take immediate and appropriate corrective action; or the employer should have known of the discriminatory conduct and "failed to exercise reasonable diligence to prevent such discriminatory conduct" (N.Y.C. Admin. Code § 8-107[13][b]). In *Doe v Bloomberg L.P.*, the Court of Appeals held that "where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employees" for the purposes of § 8-107(13)(b) (*Doe*, 36 NY3d at 459-460). Such "individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct" (*id.*). The Court further reiterated the rule that the NYSHRL "does not render [corporate] employees liable as individual employers" (*id.* at 458, citing *Patrowich v Chemical Bank*, 63 NY2d 541, 543 [1984] [differentiating between statutory "employer" under NYSHRL and individual employees of a corporate employer]).

Here, Plaintiff alleges that Daunt and Smith hold supervisory positions at B&N, that they controlled "many tangible aspects of Plaintiff's job duties," and that they personally participated in discrimination, retaliation, and other unlawful workplace practices targeted at Plaintiff (Amended Complaint ¶¶ 14-21). Specifically, Plaintiff alleges that he communicated with Daunt via email about his perceived discrimination; that Fitzgerald instigated a pretextual investigation against him; and that Smith possessed the power to control his work, discipline him, and make hiring decisions over him in her capacity as Vice President of Human Resources. In contrast, the plaintiff in *Doe v Bloomberg* was found to only have alleged facts that demonstrated that the individual defendant was an "owner or officer" of the corporation (*Doe*, 36 NY3d at 463). Accordingly, the branches of Defendants' motion seeking dismissal of the eighth cause of action, and dismissal of the entire Amended Complaint as against Smith and Daunt, is denied.

Accordingly, it is hereby:

ORDERED that the ninth cause of action is dismissed as against all defendants; and it is further

ORDERED that the remainder of Defendants' motion is denied; and it is further

ORDERED that counsel for all parties are directed to appear for a Preliminary Conference on May 9, 2023 at 9:30 a.m., at 60 Centre St., Room 212.

3/3/2023
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE